KENTUCKY SUPREME COURT

Case No. 2014-SC-472-DG

DEVLIN BURKE **APPELLANT**

On Review from Kentucky Court of Appeals (No. 2011-CA-972-MR)
v. Appeal from Kenton Circuit Court, Hon. Patricia M. Summe, Judge
Indictment No. 10-CR-563

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth of Kentucky

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CERTIFICATE OF SERVICE

I certify the appellate record was returned to the Clerk of this Court and a copy of this brief was delivered this 7th day of December, 2015 to Patricia M. Summe, Judge, Kenton County Justice Center, 230 Madison Avenue, Suite 601, Covington, Kentucky 41011 (U.S. mail); Rob Sanders, Esq., Commonwealth's Attorney, 303 Court Street, Room 605, Covington, Kentucky 41011 (email); and Kathleen K. Schmidt, Esq., Department of Public Advocacy, 200 Fair Oaks Lane, Suite 500, Frankfort, Kentucky 40601 (state messenger-mail).

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INTRODUCTION

In this criminal case, this Court granted review of a Court of Appeals panel opinion affirming the judgment of Appellant, D. Burke, and memorializing his convictions for assault and having committed a hate crime under Kentucky law.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is unnecessary in this appeal.

STATEMENT CONCERNING CITATIONS TO THE RECORD

The Commonwealth's video record citations will conform to CR 98. When citing the transcripts of court filings, the Commonwealth will use "TR[volume number], [page number]." And when citing the red brief filed in this appeal, the Commonwealth will use "Red brief, [page]."

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

1.0 Indictment.

In September 2010 Appellant, Devlin Burke, was indicted and charged with three counts of second-degree assault and one count of fourth-degree assault.[1] These charges arose from his attack on three males and a female.[2] He was later indicted for being a persistent felony offender.[3] Burke pleaded "not guilty" to these charges.[4]

2.0 Trial.

The trial in this case started on March 15, 2011 and ended two days later.[5]

According to the Commonwealth's proof, a group was bar-hopping in Covington after midnight and cutting through a gas station parking lot when a white vehicle began to back up and almost hit two of them.[6] In an effort to get the attention of the driver, the two women immediately behind the vehicle banged on its trunk and then kept walking.[7]

This banging prompted the vehicle's occupants – Charles Clark (driver), Timothy Searp, Burke, and two women – to exit.[8]

Once out of the vehicle, Searp ran to one of the bar-hoppers (Connie Kohlman), asked if she wanted "a piece of me," and then struck her in the face with his fist.[9] Someone then grabbed her hair and banged her head into a wall.[10] While she could not identify

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1 (TR1, pp. 16-19.)
2 (TR1, pp. 16-19.)
3 (TR1, p. 47.)
4 (TR1, pp. 27 & 52.)
5 (TR3, pp. 261 & 267.)
6 (VR, 03/15/11, 13:29:45 & 13:36:30-13:42:05.)
7 (VR, 03/15/11, 13:36:30-13:42:05.)
8 (*See* VR, 03/17/11, 09:16:25.)
9 (VR, 03/15/11, 14:38:50-14:46:25.)
10 (VR, 03/15/11, 14:38:50-14:46:25.)

who caused the head-banging, she could see that Searp and Burke were present.[11] She was also whipped around by her hair, pushed to the ground, and kicked repeatedly.[12] Because she was in the fetal position, she could not see who kicked her.[13]

Another of the bar-hoppers, Katie Meyer, testified she saw her friend Kohlman on the ground and being kicked.[14] Meyer identified the kicker as Burke.[15] In order to protect her friend, Meyer got on top of Kohlman and was kicked in the back.[16] Meyer told the jury that no one except Burke could have kicked her.[17] One of their friends testified she saw Burke standing over them.[18]

According to Deidre Sprague (one of the two women who banged on the vehicle's trunk), when Burke exited the vehicle she heard him say "fucking dykes," taunt her about running away, and then take off after Searp.[19] Similarly, Meyer testified she heard Burke use the vivid terms "fucking dykes" and "clit lickers" at the outset of the melee.[20]

At some point during these events Burke approached a bystander, Chris Pfeiffer, and cut him on the neck with a knife.[21] Pfeiffer testified he did not know any of the women being attacked (although when he heard screaming he thought his sister may be in the group and so he ran to them), was simply watching, and did not provoke anyone.[22]

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11 (VR, 03/15/11, 14:38:50-14:46:25.)
12 (VR, 03/15/11, 14:38:50-14:46:25.)
13 (VR, 03/15/11, 14:38:50-14:46:25.)
14 (VR, 03/15/11; 15:05:30-15:09:25.)
15 (VR, 03/15/11; 15:05:30-15:09:25.)
16 (VR, 03/15/11; 15:10:20-15:14:40.)
17 (VR, 03/15/11; 15:10:20-15:14:40.)
18 (VR, 03/15/11, 13:46:25-13:53:50.)
19 (VR, 03/15/11, 13:46:25-13:53:50.)
20 (VR, 03/15/11, 15:11:20.)
21 (VR, 03/15/11, 15:40:20-15:52:15.)
22 (VR, 03/15/11, 15:40:20-15:52:15.)

Also during these events a white van stopped at the gas station, as one of the van's occupants recognized one of the women from Burke's vehicle.[23] Another of the van's occupants, Justin Sizemore, exited the van and tried to calm things.[24] This attempt angered Burke.[25] Burke soon chased Sizemore and slashed at him with a knife, cutting his pants in the process (but missing flesh).[26]

The van's driver, James Patton, also exited and tried to calm the situation.[27] In response, Burke slashed him across the mid-section with a knife.[28] Patton did not provoke Burke before the slashing.[29] Only after he had been slashed did Patton get a work-related hammer to defend himself.[30] Even when confronted with the hammer Burke did not calm down and instead taunted Patton with "come here pussy, come on."[31]

A third van occupant, teenager Preston Akemon, was also involved in the melee.[32] According to Akemon, Burke ran up to him while he was still in the van, slashed him on the arm, and then ran off.[33] Like the others, P. Akemon did not provoke Burke.[34]

At the end of the melee Burke threw his knife at Sizemore.[35]

Once arrested, Burke denied having a knife that night, claimed that if he had had a knife then there would have been a body in the parking lot, and he never said he acted in

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23 (VR, 03/16/11, 08:11:20-08:15:00.)
24 (VR, 03/16/11, 11:40:05.)
25 (VR, 03/16/11, 11:40:05 & 11:41:40.)
26 (VR, 03/16/11, 11:46:50 & 11:48:40.)
27 (VR, 03/16/11, 09:20:35-09:26:00.)
28 (VR, 03/16/11, 09:20:35-09:26:00.)
29 (VR, 03/16/11, 09:29:10.)
30 (VR, 03/16/11, 09:26:00.)
31 (VR, 03/16/11, 09:34:25.)
32 (VR, 03/16/11, 09:59:45.)
33 (VR, 03/16/11, 10:03:00-10:09:30.)
34 (VR, 03/16/11, 10:03:00-10:09:30.)
35 (VR, 03/16/11, 11:49:20.)

self-defense.[36] He also boasted about having a reputation for using knives and that he was a stabber, not a slasher.[37]

In his defense, Burke called Searp who admitted punching Kohlman, ramming her head against a wall, and throwing her to the ground.[38] Searp denied Burke was part of this assault.[39] He also denied using any epithets.[40]

Another defense witness, Clark, echoed Searp and claimed he did not use any epithets that night.[41]

During his testimony, Burke admitted lying to the police and claimed he did not trust them.[42] Not surprisingly, Burke denied using epithets and striking Kohlman or Meyer.[43] In fact, he testified he does not refer to lesbians as "dykes" and has lesbian friends.[44] Burke also asserted he acted in self-defense when he slashed the three male victims.[45]

After receiving instructions and hearing closing arguments, the jury found Burke guilty as charged and recommended a total sentence of 17 years.[46]

3.0 Sentencing and Appeal.

Post-trial, the prosecutor filed a motion asking the trial judge to make a hate crime finding.[47] Burke responded with multiple objections and asked that the statute be declared

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36 (VR, 03/16/11, 15:22:10-15:22:55 & 15:24:05.)
37 (VR, 03/16/11, 15:23:30-15:24:05.)
38 (VR, 03/17/11, 09:19:10.)
39 (VR, 03/17/11, 09:20:10.)
40 (VR, 03/17/11, 09:32:30.)
41 (VR, 03/17/11, 10:35:20.)
42 (VR, 03/17/11, 11:05:40-11:06:15.)
43 (VR, 03/17/11, 11:25:10 & 11:41:30.)
44 (VR, 03/17/11, 11:42:10.)
45 (VR, 03/17/11, 11:22:10-11:34:55 & 12:00:00.)
46 (TR2, pp. 211-37.)
47 (TR2, pp. 245-246.)

unconstitutional.[48] At sentencing, the trial judge rejected Burke's objections and deemed his offenses hate crimes.[49] The trial judge sentenced Burke per the jury's recommendation and ordered that sentence to run consecutively to his sentence from a prior federal prosecution.[50] Burke then appealed.[51]

On July 18, 2014, a panel of the Court of Appeals rendered a detailed and exhaustive opinion affirming the circuit court's judgment.[52] Burke then successfully sought review from this Court.

ARGUMENT

1.0 The Challenge to KRS 532.031 Should be Rejected.

For his first claim, Burke asserts Kentucky's hate crime law, KRS 532.031, is unconstitutional.[53] Burke also argues there was insufficient proof to support the trial judge's hate crime findings.[54]

Kentucky Revised Statute 532.031 states the "sentencing judge" shall determine if a listed offense was committed intentionally because of "sexual orientation" (among other possibilities) and determine if the hate crime was a "primary factor" in the commission of the offense.[55] Among the listed offenses are assault in the second and fourth degrees.[56]

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48 (TR2, pp. 247-260.)

49 (TR3, pp. 267-270.)

50 (TR3, pp. 267-70; Tab 1, p. 2 n. 4 (Opinion) ("About a year before this incident, Burke had been placed on supervised release from a federal conviction for intimidating/harassing a black family based on race. *United States v. Burke*, Case No. 02-CR-58-1-JBC. At the time of sentencing, he had two years to serve on the federal conviction.").)

51 (TR3, p. 277.)

52 This opinion will be referred to as "Opinion" and is behind Tab 1 of this brief.

53 (Red brief, pp. 6-32.)

54 (Red brief, pp. 6-32.)

55 KRS 532.031(1-2).

56 KRS 532.031(1)(a).

If the "sentencing judge" makes these determinations, she is to include that in the record and judgment and then "may" use that to deny probation.[57] The Parole Board also "may" use this "in delaying or denying parole."[58]

The Kentucky hate crime law has rarely been used since its enactment in 1998.[59] Westlaw reveals no published decision interpreting this law.[60]

In its decision, the Court of Appeals panel rejected Burke's challenge[61] and Burke reasserts his as-applied challenge here.[62] The law is neither vague[63] nor overbroad,[64] and this Court should affirm the panel's decision.

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57 KRS 532.031(2-3).

58 KRS 532.031(4).

59 (*See* Tab 1, p. 2 (Opinion) ("a matter of first impression for this Court").)

60 The law has been mentioned in only five decisions. *Veney v. Wyche*, 293 F.3d 726, 733 (4th Cir. 2002); *Wireman v. Kentucky*, No. 5:14-CV-456-JMH, 2015 WL 2065940, *1 (E.D. Ky. May 4, 2015); *Thomas v. Rayburn Correctional*, No. 07-9203, 2008 WL 417759, *4 (E.D. La. Feb. 13, 2008); *Hendrix v. Commonwealth*, No. 2010-CA-305-MR, 2011 WL 113257, *1 (Ky. App. Jan. 14, 2011); *Hendrix v. Commonwealth*, No. 2004-CA-842-MR, 2005 WL 2107648, * 2-4 (Ky. App. Sept. 2, 2005).

61 (Tab 1, p. 31 (Opinion).)

62 (Red brief, p. 32 ("The hate crime statute was interpreted and applied as to render it unconstitutionally vague, and in the case of the assault second degree convictions, without a rational basis related to any legitimate state interest").)

63 *See Wilfong v. Commonwealth*, 175 S.W.3d 84, 95-96 (Ky. App. 2004) ("The void-for-vagueness doctrine requires a statute to provide fair notice by containing sufficient definiteness so that ordinary people can understand what conduct is prohibited. In addition, the doctrine mandates that the statute be worded in such a manner so as not to encourage arbitrary or discriminatory enforcement. The degree of specificity necessary to avoid unconstitutional vagueness varies depending on the type of provision. Nevertheless, the legislature need not define every term or factual situation in a statute, and terms left undefined are to be accorded their common, everyday meaning. Absolute or exact precision is not required since 'flexibility and reasonable breadth' in the language chosen is constitutionally acceptable. In reviewing a vagueness challenge, the essential inquiry is whether the statute describes the forbidden conduct sufficiently so that persons of common intelligence disposed to obey the law can understand its meaning and application." (footnotes omitted)).

64 *See Wilfong v. Commonwealth*, 175 S.W.3d 84, 96-97 (Ky. App. 2004) ("The overbreadth doctrine generally involves a claim that in an effort to control proscribable conduct, a statute impermissibly reaches constitutionally permissible conduct . . . A law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications. The overbreadth claimant bears the burden of demonstrating from the text of the law that substantial overbreadth exists." (footnotes omitted).)

1.1 Interpreting KRS 532.031 – But For Causation.

Burke begins his argument by engaging in a lengthy, complex analysis of how the hate crime law should be interpreted, citing laws from foreign jurisdictions and case law interpreting laws other than KRS 532.031.[65] In sum, he maintains that unless the proof shows an attack would not have occurred but for the protected class of the victim, then no hate crime was committed under Kentucky law.[66]

Burke's analysis is off base. First, Burke builds his argument on Iowa and federal hate crime laws that are stand-alone criminal offenses requiring proof beyond a reasonable doubt.[67] In contrast, Kentucky's hate crime law does not come into play until after trial when the "sentencing judge" may make a hate crime finding.[68] Burke admits this distinction with respect to federal law[69] and the Iowa decision he cites makes that perfectly clear.[70]

Second, his reliance on a Supreme Court decision[71] interpreting the term "because of" to mean "but for" ignores the plain language of Kentucky's law.[72] While Kentucky's

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65 (Red brief, pp. 7-15.)

66 (Red brief, pp. 7-15 & 16 ("Even if Burke had mixed reasons for the Katie Meyer assault, sexual orientation bias was not the but-for cause and he did not commit a hate crime").)

67 (Red brief, pp. 10-12.)

68 KRS 532.031.

69 (Red brief, p. 10 n. 5 ("Unlike Kentucky's statute, this describes a stand-alone criminal offense, not a sentencing enhancement or sentencing factor").)

70 *State v. Hennings*, 791 N.W.2d 828, 835 (Iowa 2010) ("The legislature's use of the words 'because of' in section 729A.2 requires that the defendant's prejudice or bias be a factual cause of the act . . . To find a causal connection, the jury need not believe the only motivation for the defendant's acts was the victim's race or other protected status. Instead, to find a defendant guilty under section 729A.2, the jury must determine beyond a reasonable doubt the defendant would not have acted absent the defendant's prejudice. Therefore, if a defendant is partially motivated by bias, but would still have committed the acts regardless of the bias, the defendant usually cannot be guilty under section 729A.2." (footnote omitted)).

71 *Burrage v. United States*, 134 S.Ct. 881 (2014).

72 (Red brief, p. 11.)

law uses the term "because of" in subsection one, the other three subsections make clear that "because of" from subsection one does not mean "but for."

For example, subsection two charges a "sentencing judge" with determining if the "hate crime was a primary factor in the commission of the crime by the defendant."[73] If the "because of" term in subsection meant "but for [the victim's protected class] the assault would not have occurred," that would nullify subsection two since there would be no need to determine if hatred of a protected class was a "primary factor in the commission of the crime" since, by definition, a hate crime would not occur absent it being the actual, but-for cause of the offense.[74]

Stated differently, that the legislature charged the "sentencing judge" with determining if the "hate crime was a primary factor in the commission of the crime" means the hatred of a protected class can be one of several factors "in the commission of the crime." Just because hate was a "primary factor" in the commission of the crime does not necessarily mean that absent that hate the crime would not have occurred.[75]

For example, if a pyromaniac picks an African-American's home to burn primarily because of the homeowner's race, race would not be a but-for cause of the arson since the arsonist was going to burn something anyway. Under Kentucky's hate crime law, race can nonetheless be the "primary factor in the commission of the [arson]" without it being the but-for cause, *i.e.*, absent the homeowner's race the arson would not have occurred.

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73 KRS 532.031(2).

74 *See Falk v. Alliance Coal, LLC*, 461 S.W.3d 760, 764 (Ky. 2015) ("we presume" legislature "intended for statute to be construed as a whole [and] for all of its parts to have meaning").

75 (*Contra* Red brief, p. 22 ("This Court should read both sections of the statutes together in harmony and hold that 'primary factor' means the hate crime was the but-for cause of the commission of the offense").)

Similarly, applying Burke's interpretation of "because of" to KRS 532.031 would mean the nullification of subsections three and four, as well, since there could be no finding "that a hate crime was a primary factor in the commission of the crime." It would either be the actual, but-for factor in the commission of the crime – *i.e.*, the "primary factor" – or a lesser factor.

This Court must presume the General Assembly intended Kentucky's hate crime law "to be construed as a whole, for all of its parts to have meaning," and for it not "to be absurd."[76] To interpret it as Burke suggests would run counter to this presumption and result in much of it having little to no meaning.

Finally, Burke maintains the "as a result of" term in subsection one reinforces his interpretation.[77] This is incorrect, as subsection one states that *if* the defendant committed a certain offense "because of race, color, religion, sexual orientation, or national origin of another individual or group," *then* the "sentencing judge" may find the defendant to have committed the offense "as a result of a hate crime."[78] The "as a result of" term is nothing more than a consequence of the condition following the word "if" being satisfied. It does not reinforce or support Burke's narrow interpretation of the law.

1.2 Interpreting KRS 532.031 – Protected Class Membership.

In a further attempt to gut KRS 532.031, Burke argues the victim of a hate crime must be a member of one of the specified protected classes in order for the law to apply.[79] Burke offers no relevant legal authority supporting his position. This is not surprising, as

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76 *Falk v. Alliance Coal, LLC*, 461 S.W.3d 760, 764 (Ky. 2015).

77 (Red brief, p. 15.)

78 KRS 532.031(1).

79 (Red brief, pp. 12-14 ("Kentucky's statute requires the defendant's intentional act to be because of the characteristics of the individual assaulted") & 23 ("The prosecutor never proved the sexual orientation of anyone Burke encountered. The statute by its plain language requires that proof come from the trial, and cannot be construed otherwise.").)

nothing in Kentucky's hate crime law requires such an extreme and invasive focus on the victim.

In its decision, the panel rejected Burke's attempt to minimize his words and motivations and instead put the spotlight on the victim:

> While there was no proof any of the women involved were lesbians, we have been cited no clear authority requiring such proof. Moreover, to impose such a requirement would unnecessarily further invade the privacy of the women – and the men who tried to help them.
>
> Burke reads KRS 532.031 to require proof of the sexual orientation of the victim of a hate crime based on one's sexual orientation. This puts the focus on the victim when the focus must be on Burke and his actions.
>
> According to Burke, he was a peacemaker, trying to calm Abney and coax her back into the car so they could leave. In contrast, Sprague quoted Burke as saying, "fucking dykes," laughing, and saying, "You gonna run," then standing over Meyer and Kohlman with his hands up and his fists clenched. Meyer was kicked in the back as she attempted to protect Kohlman. Meyer quoted Burke as saying, "fucking dykes" and "clit lickers." On appeal, Burke suggests he was just out of control in a chaotic situation. But no one testified to that at trial. Importantly, when Burke testified he did not say he acted to intimidate his victims, or because he was angry and out of control – explanations he offers for the first time on appeal.
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> Fourth, there is no requirement that the actor's motivation be accurate, only that it prompted him to act. Whether Meyer and her female friends were lesbians is not the key.
>
> Whether accurate or not, Burke's belief that they were, as expressed by his own words, suggested his intention to act based on sexual orientation and convinced the trial court of his hatred by a preponderance of the evidence. Meyer was Burke's first victim, followed by Pfeiffer, Patton and Akemon – three men who tried to help. Once the attack began, it did not stop until police arrived and placed Burke in handcuffs.
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> As found by the trial court, four people were assaulted as a result of Burke's hatred of lesbians. We endorse the trial court's rationale that Burke engaged in a single episode that began with an assault on a woman, and ended with assaults on three men who offered her assistance.[80]

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[80] (Tab 1, pp. 29-30 (Opinion) (text reformatted).)

The panel's decision is sound. If the General Assembly wanted to put the focus on the victim and require the victim to prove membership in a protected class, it would have done so. The General Assembly did not, however, and instead put all the focus on the defendant and his actions and intentions.

Nothing in KRS 532.031 states or suggests a victim must declare in court, "I am a lesbian" or "I am a Jew," before the law applies. Likewise, nothing in the law indicates a defense lawyer should have the ability to challenge a victim about whether she is truly a lesbian or Jew. That Burke would argue this is how KRS 532.031 should be interpreted[81] – and that juries are to determine beyond a reasonable doubt whether the victim truly is a lesbian or Jew[82] – is both absurd and vile, and must be strongly condemned.

1.3 Trial Judge's Factual Determinations.

Moving on from how he believes KRS 532.031 should be interpreted, Burke also contends the trial judge's factual findings were faulty.[83] Burke spends page after page rehashing the trial proof and viewing it through his self-interested lens.

In the judgment of conviction, the trial judge made the following findings of fact with respect to the hate crime designation:

> The Court makes the following findings of fact: The defendant who was seated in the back passenger seat exited the vehicle just behind the woman who occupied the front passenger seat. The male driver stayed at the vehicle after he exited. A third male exited the vehicle from the back driver's seat.
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> These individuals exited the car after and because a woman hit the trunk of the car with her hands to alert the driver to her presence. No words had been exchanged prior to the defendant's exit from the vehicle, although the woman passenger may have yelled some expletives. The woman who

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81 (Red brief, p. 25 ("This Court should interpret the statute to require proof of the sexual orientation of the victim").)

82 (Red brief, pp. 23-25 & 31-32.)

83 (Red brief, pp. 15-25.)

> hit the car was walking in a group with one to two other women. These women kept on walking because they had no reason to divert their course of travel.
>
> The defendant, after getting out of the car, made a derogatory statement about the sexual orientation of the women and, after rounding the comer onto Pike Street, assaulted a woman in the group. At that time there were no other persons yet on the scene. The assault by the defendant and the other male as well as the argument between the female passenger and another woman in the walking group caused several groups of individuals to stop and attempt to break up the situation. The defendant then cut three men who arrived on the scene to assist.
>
> The facts demonstrate that the defendant intentionally left the vehicle to assault women he believed to be lesbians. All his other actions including all of the assaults stem from his intention to harm a person because of their sexual orientation.
>
> Based on these trial facts, the court finds by a preponderance of the evidence that a hate crime was the primary factor in the commission of the Assault in the 4th degree and the three Assaults in the 2nd degree.[84]

In its decision, the Court of Appeals panel found these findings to be "sufficient."[85]

The panel was correct. Burke clearly thought the women were lesbians when he used the terms "fucking dykes" and "clit lickers." This language and his subsequent attack on Meyer indicate he attacked her based on his belief that she was a lesbian. If his belief turned out to be wrong, his decision to attack her nonetheless was primarily based on sexual orientation and not something else.

As for the three male victims, the trial judge correctly found that in the chaotic melee that erupted that night, Burke's assault on the male victims stemmed directly from his assault on a person he believed to be a lesbian. These three assaults would not have occurred absent Burke's sexual orientation-based attack and were, as the proof revealed, part of a single violent episode. Again, hate was the primary factor in these attacks.

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84 (TR3, p. 268 (text reformatted).)

85 (Tab 1, p. 31 (Opinion).)

There was no clear error in the trial judge's findings.[86] The findings were supported by a preponderance of the evidence.[87] The panel's decision should not be disturbed.

1.4 Pretrial Notice.

Next, Burke maintains he was entitled to pretrial notice "in the indictment" that a hate crime was at issue or, if not in the indictment, then simply "reasonable" pretrial notice was required.[88]

"Every person is conclusively presumed to know the law . . . ."[89] Further, the law mandates that a trial judge "shall" determine whether a hate crime was a primary factor in the commission of the crime and, if so, the trial judge "shall" make written findings and place them in the record and judgment.[90]

In light of this, Burke and his lawyers were on constructive notice the hate crime statute was in play. They were "conclusively presumed" to know of the statute's existence as well as that the trial judge was duty-bound to consider the trial proof and make the determination whether a hate crime had been committed. When one also considers that from the beginning there were allegations of homophobic epithets and hate-related motives, it is inconceivable Burke and defense counsel were unaware the trial judge would be considering KRS 532.031.

As for Burke's effort to analogize a hate crime designation to punishment or a factor affecting punishment, he is far off base.[91] The statute makes clear that the trial judge's

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86 *Turley v. Commonwealth*, 399 S.W.3d 412, 417-18 (Ky. 2013) (standard of review).

87 *Parrish v. Kentucky Bd. of Medical Licensure*, 145 S.W.3d 401, 411 (Ky. 2004) (preponderance of evidence is evidence which is of greater weight or more convincing than evidence which is offered in opposition to it).

88 (Red brief, pp. 25-30.)

89 *Oppenheimer v. Commonwealth*, 202 S.W.2d 373, 375 (Ky. 1947).

90 KRS 532.031(2).

91 (Red brief, p. 26.)

finding will be but one factor the Parole Board "may" consider.[92] This designation has no for-sure impact on punishment or parole eligibility, does not implicate "additional punishment" as Burke suggests, and is not binding on the Parole Board. The effects of a hate crime designation are not even remotely similar to the certain effects of persistent felony offender status (KRS 532.080) or "violent offender" status (KRS 439.3401).

Burke's complaints he did not have "an opportunity to defend himself" fall flat, as well.[93] In his brief he offers one "might have" done this, "might have" done that after another, all of which are vague and speculative and were available to him at the time of trial.[94]

Burke's assertions that the prosecutor engaged in "tacit misdirection" and he was unaware of this case's hate crime potential are absurd.[95] A month before trial the defense filed a motion asking the trial judge to bar use of the term "hate crime."[96] In fact, the motion made four references to this term and also sought to bar use of the terms "white man, white power," "lesbian," "bitch," "homo," "faggot," and "you fucking dykes."[97]

Defense counsel does not employ the rarely used term "hate crime" without some belief that a hate crime is at issue. When one also considers the allegations contained in the discovery materials, there is no real doubt that Burke and his counsel were well-aware of the potential for a hate crime designation.

Similarly, while Burke focuses on his motion's statement that "the alleged offense was not charged as a hate crime" and the prosecutor's failure to acknowledge her plan to

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92 KRS 532.031(4); KRS 439.330(1).

93 (Red brief, pp. 26-28.)

94 (Red brief, pp. 26-28.)

95 (Red brief, pp. 28-29.)

96 (TR1, pp. 67-72 (filed February 14, 2011).)

97 (TR1, pp. 67 ("hate crime" and other terms), 69 ("alleged offense was not charged as a hate crime"), 70 ("hate crime"), & 71 ("hate crime").)

seek a hate crime designation,[98] he fails to point to anything indicating that the prosecutor planned ahead of trial to seek the designation. Since the statute relies on trial proof, it is not surprising the prosecutor did not commit to the hate crime road prior to trial since she did not know how the trial proof would unfold. It makes perfect sense a prosecutor would wait until after trial to assess that proof and decide how to proceed.

Finally, nothing in the law states or suggests a "sentencing judge" must wait to be prompted by the prosecution to make a hate crime finding.[99]

Despite spending five pages arguing this pretrial notice claim, Burke fails to make a dent in the panel's cogent analysis rejecting his position.[100]

1.5 Information Provided to the Jury.

Burke also argues the jury should have been provided information about the effects of a hate crime designation on parole eligibility and by not hearing this information, he maintains what the jury heard was inaccurate, incomplete, and skewed.[101] He cites not one relevant legal authority in support, thereby inviting skepticism of his claim.[102]

In making this argument, Burke ignores the obvious. Specifically, there was nothing prohibiting him from providing information about KRS 532.031 to the jury. The statute he cites provides express authority for him, as the defendant, to have provided this information.[103] Burke also recognizes this in his brief.[104]

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98 (Red brief, p. 28.)

99 KRS 532.031.

100 (Tab 1, pp. 25-28 (Opinion).)

101 (Red brief, pp. 30-31.)

102 *See Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) (court expresses skepticism of appellant's constitutional challenge due to failure to cite "any real supporting authority for his argument").

103 KRS 532.055(2)(b).

Of course, had he done so it would have made relevant his swastika tattoos, white supremacist tattoos, and their meanings.[105] Similarly, this information would be relevant if this Court agrees that the jury must make the hate crime findings.[106]

While Burke has made an argument and asked for what he always had the right to do,[107] he has failed to undercut the panel's decision or offer anything relevant to support his demand for a new trial.[108]

1.6 Jury Finding.

Burke argues the jury – not the trial judge – must decide whether a hate crime was committed, citing *Apprendi v. New Jersey*[109] and *Jones v. United States*[110] in support.[111] Yet again, he invites skepticism by failing to cite a single relevant authority.[112]

In its decision, the panel quickly addressed this argument by highlighting the limited effect of KRS 532.031:

> First, a jury plays no role in determining whether a crime is a hate crime – that decision is made by the sentencing judge alone, based upon a review

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104 (Red brief, p. 28 ("Burke agrees with the Court of Appeals' conclusion that this would be relevant information which Burke would have been allowed to introduce in the penalty phase").)

105 (TR1, pp. 69 ("Mr. Burke has various tattoos on his body such as swastikas and a depiction of Adolph Hitler, which are commonly known to represent affiliation or alliance with white supremacy organizations"), 80 ("swastikas, a depiction of Adolph Hitler, and the letters 'SAC,' which stands for 'soldier of aryan [sic] culture'"), & 107 ("tattoo which says 'skinhead' on [his] abdomen").)

106 Argument, Section 1.6, *infra*.

107 (Red brief, p. 31 ("Burke request [sic] that this Court issue an opinion that makes it clear that under KRS 532.055 this would be admissible evidence relevant to parole eligibility as well as potentially mitigating evidence").)

108 (Red brief, p. 31 ("He also requests that this Court vacate his sentence and remand for a new sentencing hearing in which this evidence can be presented").)

109 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

110 *Jones v. United States*, 526 U.S. 227 (1999).

111 (Red brief, pp. 31-32.)

112 *See Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) (court expresses skepticism of appellant's constitutional challenge due to failure to cite "any real supporting authority for his argument").

> of evidence developed at trial. Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Burke argues the hate crime determination must be made by a jury beyond a reasonable doubt to pass constitutional muster.
>
> While having jurors make the determination was certainly an option, the legislature opted for a different route, and that route is sound. Because a finding of a hate crime in Kentucky has only minimal effect – creating just one more factor a sentencing judge may use to deny probation, and another factor the parole board may use to deny or defer parole – it need not be made by a jury. More to the point, because the statute does not increase the maximum penalty for any crime, the constitution does not require it to be made by a jury.
>
> . . .
>
> Unlike the statute in *Apprendi*, which provided for an "extended" term of imprisonment, KRS 532.031 does not increase the maximum penalty for any crime – a fact Burke admits. Its impact is limited to the amount of time one actually serves once sentence is pronounced.
>
> Comparison to KRS 439.3401, Kentucky's violent offender statute, is not a perfect match.
>
> If one is convicted of a violent crime, he "shall not be released on probation or parole" until he has served a specified portion of his sentence. A finding of a hate crime is not so definite – it may have no impact whatsoever since it is just one more factor that may be considered by the sentencing court and parole board.[113]

The panel's ruling was sound. Burke's continued reliance on *Apprendi* and *Jones* is misplaced. A hate crime designation has no impact on the penalty for a criminal offense and, therefore, the legislature is not obligated to leave that determination for juries.[114] Moreover, in Kentucky there is no constitutional right to jury sentencing.[115]

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113 (Tab 1, pp. 24-25 (Opinion) (citation truncated; text reformatted).)

114 *See Burrage v. United States*, 134 S.Ct. 881, 887 (2014) ("Because the 'death results' enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt"); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

1.7 Remedy.

Should this Court rule the trial judge's findings were faulty, the most Burke could hope for is remand for entry of a new judgment of conviction without the hate crime finding. Since the trial judge did not consider the hate crime finding in denying Burke probation, Burke would not be entitled to a second bite at the probation apple.[116] Burke appears to recognize this.[117]

As for Burke's assertion that a new trial would be warranted should this Court accept his pretrial notice or jury sentencing arguments, that assertion is nothing more than a fantasy since those arguments have no basis in law or fact.[118]

2.0 The Evidentiary Rulings Were Proper Or, If Not, Non-Prejudicial.

For his second claim, Burke maintains the admission of irrelevant and prejudicial evidence denied him a fair trial.[119] He divides his argument into three parts.

2.1 Swastika Tattoo.

Initially, Burke complains about the admission of a color photograph of his upper body and face showing his many tattoos, including a small tattoo of a swastika on his left shoulder.[120] He asserts its admission violated his right to free speech and due process.[121] A copy of this photograph may be found behind Tab 3 of this brief.

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115 *Williams v. Jones*, 338 S.W.2d 693, 694 (Ky. 1960) ("The constitutional right to trial by jury extends to the trial of the issue of guilt or innocence where a plea of not guilty has been entered and does not extend to the fixing of the penalty").

116 (*See* TR3, p. 268.)

117 (Red brief, p. 32 ("That portion of the judgment must be vacated for insufficient evidence").)

118 (Red brief, p. 32.)

119 (Red brief, pp. 32-44.)

120 (Red brief, pp. 33-38.)

121 (Red brief, p. 34.)

Before trial, the trial judge considered a defense motion to preclude admission of this photograph.[122] After extensive back-and-forth, the trial judge allowed the prosecutor to use this photograph to prove Burke's identity and to publish it to the jury but qualified her ruling by ordering the photograph would *not* be taken by the jurors into their deliberations and that the witnesses would not refer to the swastika during their identification of Burke.[123] In line with this, at one point the trial judge directed the prosecutor to "quickly" publish the photograph to the jury.[124]

When faced with this issue, the Court of Appeals panel found the photograph was properly admitted for identification purposes:

> Burke's hands, arms, shoulders and upper torso are cluttered with a continuous sweep of tattoos – including a prominent skull and gun sight in dark ink on his Adam's apple. A much lighter-inked swastika appears on his left shoulder. Although not depicted in the record, his abdomen bears a tattoo of Adolph Hitler and the word "skinhead." The letters "SAC" [Soldiers of Aryan Culture] appear over his left eye.
>
> With the exception of images on his hands and some on his neck, all his tattoos were concealed from jurors by a long-sleeved shirt with a buttoned collar and tie.
>
> . . .
>
> The trial court permitted the Commonwealth to use the photo for identification purposes. It was identified by the Commonwealth's first three witnesses – all of whom testified early on the opening day of the three-day trial. After each witness identified the photo, it was quickly published to the jury. We discern no error.
>
> Although indicted alone, Burke and Searp were both active during the episode. Witnesses distinguished the two men on three characteristics. Searp had longer hair, only a few tattoos and wore a white tank top; Burke had a buzz cut, a continuous maze of tattoos on his upper body, and wore a gray tank top. One photo of each man was introduced at trial.

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122 (VR, 03/15/11, 08:01:20-08:09:15.)
123 (VR, 03/15/11, 08:01:20-08:09:15.)
124 (VR, 03/15/11, 13:42:05-13:42:45.)

> Witnesses described the two men differently, but all agreed the heavily tattooed man inflicted the knife wounds and stood over Meyer when she was kicked in the back. Throughout trial, Burke wore a long-sleeved shirt buttoned at the collar to conceal his tattoos. Thus, just looking at Burke in the courtroom, jurors could not tell whether he was more heavily tattooed than Searp.
>
> . . .
>
> More than a month before trial began, the trial court recognized it would have to balance potential prejudice from Burke's tattoos against the need for solid identification of the culprit.
>
> The trial court did just that by allowing introduction of a single photo of Burke and a single photo of Searp. While Burke's photo was published briefly to the jury on just three occasions, jurors had no access to the photo while deliberating – thus eliminating the opportunity for them to study the photo. Witnesses who had noticed and commented on the swastika were warned not to mention it and no one ever did. It is disingenuous for Burke to argue no one identified him based on the swastika because at least one, Pfeiffer, did – but not in front of the jury.
>
> Additionally, there was some confusion about whether the man who attacked Meyer wore a white or gray top, which made the photos of both men more relevant.
>
> The trial court's ruling is consistent with *Bell* [*v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994)]. The photo was relevant on the issue of identification. It was probative because it showed how Burke appeared at the time of the episode and demonstrated Burke was heavily tattooed in comparison to Searp.
>
> Finally, the probative value of the photo far outweighed the risk of prejudice. Burke seizes upon the swastika – which is fainter than many of Burke's other tattoos – and is not the first tattoo to which the eye is drawn. None of the tattoos were singled out for comment or explanation.[125]

The panel also noted that even if admitted in error, that error was harmless "in light of the overwhelming proof of guilt."[126]

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[125] (Tab 1, pp. 13 & 32-35 (Opinion) (footnote omitted; text reformatted).)

[126] (Tab 1, p. 35 (Opinion).)

The panel's ruling was correct and should not be disturbed. Initially, Burke argues the "exact nature of [his] tattoos" "was irrelevant to any material issue at trial" and maintains the "swastika tattoo did not prove identity."[127] He asserts the trial witnesses "did not identify [him] specifically because of the swastika tattoo but because he was heavily tattooed" and that Meyer "identified the man she saw as having a lot of tattoos," not a swastika.[128]

Burke, however, fails to recognize the prosecutor advised that multiple witnesses would identify Burke based on his swastika tattoo.[129] In an effort to allow the prosecution witnesses to identify Burke based on his tattooed appearance while minimizing the prejudice that may flow from Burke's specific tattoos, the trial judge directed the prosecutor to admonish these witnesses not to mention Burke's swastika as the basis of their identification, the prosecutor agreed to do so, and no witness mentioned the swastika tattoo during trial.[130]

In light of the trial judge's concession to Burke's concerns, his assertion that the victims "did not identify [him] specifically because of the swastika tattoo but because he was heavily tattooed" is specious. Burke's heavy tattoos were key to identifying him as the one who assaulted Meyer.[131] The defense, though, convinced the trial judge to preclude the prosecutor from focusing on the swastika tattoo and instead focus the identification on Burke's general appearance that night.

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127 (Red brief, pp. 34-35.)

128 (Red brief, pp. 34-35.)

129 (TR1, p. 106 ("There are witnesses that recall and will state that they remember swastika tattoos on the Defendant and other specific tattoos on the Defendant's body").)

130 (VR, 03/15/11, 08:05:50-08:09:15.)

131 (VR, 03/15/11, 13:42:50 & 15:08:00.)

Further, from the beginning the defense focused on the identity issue when counsel noted Burke wore a gray tank-top, Searp wore a white one, and Meyer and Kohlman initially told police the man wearing the white tank-top (*i.e.*, Searp) committed the kicking assault.[132] Defense counsel continued this attack during cross-examination, as well.[133]

By calling into question which tank-top-wearer assaulted Meyer, it was necessary for the prosecution to distinguish Burke from Searp based on another characteristic: their tattoos. The record shows both Burke and Searp had tattoos with Burke being more heavily tattooed.[134] To distinguish one from the other based on their tattoos, it was necessary to introduce a photograph of each man and show one was more heavily tattooed (Burke) than the other (Searp). Had the Burke photograph been deemed inadmissible, the defense could have easily muddled the identity issue even further since there would have been no way for the jury to compare heavily tattooed Burke and Searp. That is, the Burke photograph was relevant since it had a "tendency to make the existence of any fact that is of consequence to the determination of the action" – *i.e.*, identity – "more probable or less probable than it would be without the evidence."

Burke also argues the trial judge's KRE 403 analysis was faulty.[135] The trial judge did not abuse her discretion in admitting the Burke photograph. In ruling on this issue, the trial judge minimized the jury's potential exposure to the swastika tattoo by directing that the victims could not refer to it when identifying Burke and by precluding the jury from taking the photograph into their deliberations. Similarly, while the jury was able to

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132 (VR, 03/15/11, 13:12:30-13:14:00 (opening statement).)
133 (VR, 03/15/11, 15:18:20-15:23:10 & 15:24:45-15:27:50.)
134 (VR, 03/17/11, 11:43:10.)
135 (Red brief, pp. 37-38.)

see the photograph on a few occasions, the overall exposure was brief and Burke offers nothing indicating the jury had a chance to focus on any of his specific tattoos.

These precautions were most certainly effective since, as the photograph reveals, the swastika is small and nearly lost in the maze of dark-colored skin art. With almost all of Burke's skin below his jaw being covered in dark ink, one's eye is naturally drawn to his face and black eye and away from the cacophony of tattoos.

Considering the swastika's characteristics in relation to the rest of Burke's tattoos and his face, and the trial judge's efforts to minimize the jury's exposure to the photograph, it is unlikely any member of the jury even saw the swastika. Because of this, any prejudice flowing from the photograph was minimal and was not outweighed – let alone "substantially outweighed" – by the danger of the jury reacting to the swastika tattoo and convicting Burke because of this and not the trial proof.

Next, Burke asserts the use of his photograph was "an unfair and extremely damaging attack on his character" and KRE 404 should have barred its admission.[136] This argument is absurd. At no point during the trial did the prosecutor mention Burke's swastika tattoo to a witness or the jury, let alone suggest that this tattoo had anything to do with Burke's character, the offenses at issue, or that Burke acted in conformity with the message of his swastika tattoo.

Not surprisingly, Burke musters only one record citation in support of his character-based argument and that citation is to the sentencing hearing when such reference was

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136 (Red brief, pp. 35-37.)

perfectly legitimate.[137] And when Burke opened the door about his tattoos and their significance, the trial judge would not allow the prosecutor to proceed.[138]

As for the several cases cited by Burke, not a single one helps his cause. His citation of *Dawson v. Delaware*[139] to substantiate his First Amendment claim is off the mark since the prosecution in *Dawson* invited the jury to focus on the defendant's association with the Aryan Brotherhood (via stipulation) while here the prosecution did nothing to call the jury's attention to Burke's small swastika tattoo buried in the many tattoos on his upper body.[140] Further, the nation's high court noted the admission of this proof could be deemed harmless.[141]

Similarly, *Brown v. Commonwealth*[142] provides no support since the *Brown* court found no error with respect to the admission of a photograph of the defendant's tattoo.[143] Rather, the *Brown* court found error in the prosecutor's cross-examination of the defendant about his various tattoos (the prosecutor focused his closing argument on the defendant's testimony about three of his tattoos).[144]

Likewise, *Floudiotis v. State*[145] is unhelpful since, in contrast to this case, "none of the witnesses to the assault could give anything better than a general description of the

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137 (Red brief, p. 37 ("prosecutor used the photo of the swastika to argue this was a hate crime. VR, 5/17/11, 09:07:55").)

138 (VR, 03/17/11, 11:45:00-11:47:55.)

139 *Dawson v. Delaware*, 503 U.S. 159 (1992).

140 (Red brief, p. 36.)

141 *Dawson v. Delaware*, 503 U.S. 159, 168-69 (1992).

142 *Brown v. Commonwealth*, 313 S.W.3d 577, 617-21 (Ky. 2010).

143 (Red brief, p. 36.)

144 *Brown v. Commonwealth*, 313 S.W.3d 577, 617-21 (Ky. 2010).

145 *Floudiotis v. State*, 726 A.2d 1196, 1203-04 (Del. 1999) ("The State argued that the photographs show what the defendants looked like on the night of the assault. But the witnesses to the attack in the parking lot of the Deer Park gave nothing more than a general description of the assailants as young men, similarly dressed, with short haircuts. Significantly, not one

assailants," rendering photographs showing each defendant's offensive tattoos and t-shirt irrelevant for identification purposes and inflammatory.[146]

The other decisions Burke relies on, *United States v. Thomas*[147] and two from foreign jurisdictions, are so unlike this case they do not warrant any discussion.[148] Burke's citation of two not-to-be published decisions of this Court is improper, as he makes no effort to demonstrate that their citation is necessary.[149] Indeed, the unpublished *Hicks*[150] decision bears little resemblance to this case since the trial judge in that case directed the defense witness to remove his shirt and display a swastika tattoo to the jury.

Finally, and as the panel correctly found, even if the photograph was erroneously admitted that error was harmless.[151] The jury's exposure to the photograph was minimal, it is unclear whether the jury even noticed the swastika, and even if the jury noticed the swastika this one small tattoo in the sea of tattoos on Burke's upper body could not have impacted the jury's decision to convict him.[152] Further, the proof that Burke committed the offenses was overwhelming and his testimony to the contrary was simply not credible.

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witness to the assault testified as to the tee-shirts or the tattoos worn by the defendants, so the tee-shirt depiction did not go to identification.").

146 (Red brief, p. 37.)

147 *United States v. Thomas*, 321 F.3d 627 (7th Cir. 2003).

148 (Red brief, pp. 36-37.)

149 (Red brief, pp. 35 & 37); CR 76.28(4)(c).

150 *Hicks v. Commonwealth*, No. 2007-SC-751-MR, 2009 WL 3526699, **8-9 (Ky. Oct. 29, 2009).

151 (Tab 1, p. 35 (Opinion).)

152 *See Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) ("A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error").

2.2 Pill Bottle and Green-Handled Knife.

Burke also complains about the testimony elicited from Clark by the prosecution regarding the pill bottle, drug dog alert, and green-handled knife found in his vehicle.[153] Burke asserts this evidence was irrelevant and unduly prejudicial.[154]

While the panel found Clark's testimony about the knife and drug dog alert to be relevant, it found the trial judge's admission of his testimony about the pill bottle was erroneous but harmless.[155] Even if this Court concludes the trial judge erred in all respects as to Clark's testimony and the panel was incorrect in ruling to the contrary, no relief is warranted.

That Clark had someone else's pill bottle in his vehicle and a drug dog alert led to this discovery could not have influenced the jury's decision about whether Burke slashed the three males and assaulted Meyer; the latter does not follow from the former.

Similarly, the prosecutor's examination of Clark about this issue back-fired since he had a reasonable explanation for why the pill bottle was in his vehicle and this explanation was not challenged.[156] In fact, the prosecutor ended her cross-examination after he offered this explanation.[157]

As for the green-handled knife, Clark testified it was his.[158] Likewise, Burke testified the brown-handled knife was his, he used it to cut the victims, and he threw it prior

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153 (Red brief, pp. 38-41.)
154 (Red brief, pp. 38-41.)
155 (Tab 1, pp. 35-37 (Opinion).)
156 (VR, 03/17/11, 10:42:10-10:43:20.)
157 (VR, 03/17/11, 10:42:10-10:43:20.)
158 (VR, 03/17/11, 10:40:05.)

to police arriving.[159] Burke's complaints about possible prejudice and confusion stemming from testimony about the green-handled knife are nonsense.[160]

None of this testimony, whether individually or collectively, swayed the outcome of the trial.[161]

2.3 Addresses.

Next, Burke takes aim at the prosecutor asking two of her female witnesses (Meyer and Sprague) if they felt comfortable identifying where they lived.[162]

In its decision, the panel thought little of Burke's complaint and found that even if error occurred, that error was harmless:

> Burke's next claim is that the trial court allowed the prosecutor to ask Sprague and Meyer if they were comfortable stating their addresses for the record knowing they were not, and giving the impression they were afraid of Burke because he was dangerous and guilty. We disagree.
>
> While the address of a witness was not an element of any of the crimes charged, it is normal for a witness upon taking the stand to state her name and address. The prosecutor knew Sprague and Meyer did not want to make their addresses public knowledge. In this day and age of privacy and security concerns, that is not an unreasonable request since courtrooms and court records are open to public view.
>
> Burke suggests the women's fear reflected adversely on him. However, their concern may have been wholly unrelated to him, and as the Commonwealth argues, this exchange happened early in the trial and jurors would have recognized their concern.
>
> Again, applying *Crossland* [*v. Commonwealth*, 291 S.W.3d 223, 233 (Ky. 2009)], we cannot say Sprague and Meyer's desire not to reveal their addresses due to the circumstances and the ultimate resolution of allowing

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159 (VR, 03/17/11, 11:28:10 & 11:31:20-11:34:55.)

160 (Red brief, pp. 40-41; Tab 1, p. 36 (Opinion) (due to "overwhelming proof of Burke's guilt, jurors did not convict him because Clark, the quintet's chauffeur, kept a knife in this car").)

161 *See Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) ("A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error").

162 (Red brief, pp. 41-42.)

them to state a general location resulted in Burke's conviction. Contrary to Burke's position, any error was harmless at most.[163]

The panel's ruling is correct. Burke fails to in any way show the panel somehow got things wrong.[164] Even if error occurred, it had no effect on the trial's outcome.[165]

2.4 Constitutional Error.

Burke's effort to elevate his state law-based evidentiary claims into constitutional claims should be summarily rejected.[166] Burke's trial was fair and his evidentiary claims have no grounding in constitutional law.

3.0 The Instructions Do Not Warrant Reversal.

For his third claim, Burke argues the guilt phase instructions were confusing and erroneous, and invited a non-unanimous verdict.[167] Burke asserts this claim was "partially preserved" for review and asks for plain error relief under RCr 10.26.[168]

Briefly, the instructions included a road map of options for each count (Instruction No. 3); a stand-alone instruction for self-protection (Instruction No. 5); for the three assault in the second degree counts of the indictment, an assault second and assault fourth instruction with the latter referencing imperfect self-defense (Instruction Nos. 6-11); and for the single assault in the fourth degree count, an assault fourth instruction (Instruction

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163 (Tab 1, pp. 37-38 (Opinion) (text reformatted).)

164 (Red brief, p. 42.)

165 *See Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) ("A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error").

166 (Red brief, p. 43); *see Jones v. Commonwealth*, 331 S.W.3d 249, 256 (Ky. 2011) (rejecting claim alleged error regarding admission of bad acts evidence was constitutional in nature).

167 (Red brief, pp. 44-49.)

168 (*See* Red brief, p. 44 ("This issue is arguably partially preserved . . . Burke urges review under RCr 10.26").)

No. 12).[169] Mirroring the road map instruction (Instruction No. 3), the verdict forms for the assault second offenses set forth each option the jury could consider.[170]

A copy of the jury instructions and verdict forms are behind Tab 5 of this brief.

3.1 Second-Degree Assault and Self-Protection Instructions.

At the outset, Burke maintains the guilt-phase instructions "did not correctly express the law of self-protection and misled and confused the jury" since neither the assault instructions nor the general self-protection instruction "alerted the jury that if it rejected perfect self-defense for assault second degree, it must still consider the elements of imperfect self-defense, and it MUST go on to consider the assault fourth degree [instruction]."[171] According to Burke, the "jury would naturally stop deliberating once it believed [he] intentionally caused a physical injury with a deadly weapon or dangerous instrument and was not privileged to act in (perfect) self-defense."[172]

Jury instructions are to be read as a whole.[173] That is, instructions are to be considered as a series and read in their entirety.[174] When reading and applying instructions, a jury is deemed to be composed of intelligent people using their common sense.[175]

When read as a whole, the instructions in this case plainly contradict Burke's contentions. The road map instruction (Instruction No. 3) makes clear there are numerous options for each assault second count of the indictment; each lesser assault in the fourth degree instruction (Instruction Nos. 7, 9, & 11) states at the outset that it represents an al-

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169 (TR2, pp. 211-221.)

170 (TR2, pp. 222-225.)

171 (Red brief, p. 44 (emphasis in original).)

172 (Red brief, p. 45.)

173 *Jackson v. Commonwealth*, 147 S.W.2d 715, 718 (Ky. 1941) ("One of the cardinal rules in construing instructions is that they must be read as a whole, and that all parts of any one instruction must be thus read in order to ascertain the meaning and import").

174 *Carson v. Commonwealth*, 382 S.W.2d 85, 95 (Ky. 1964).

175 *Bowman v. Commonwealth*, 143 S.W.2d 1051, 1053 (Ky. 1940).

ternative should the jury not find Burke guilty of assault in the second degree; each lesser assault fourth instruction contains an imperfect self-defense component; and each verdict form for the assault second counts, like the road map instruction, presents the jury with its several options.[176]

As for Burke's contention the perfect self-protection instruction should have explained imperfect self-defense as well and that the trial judge should have given a "companion instruction" as tendered by the defense,[177] he offers no legal support.[178] Further, his contention is at odds with the implementation of self-protection (perfect and imperfect) in the relevant form instructions found in Cooper's treatise in which perfect self-protection has its own instruction and the imperfect self-perfection concept is incorporated into the lesser offenses.[179]

Burke's belief the jury would not bother reading through all of the instructions in performing its sacred duty is absurd. The second-degree assault and perfect self-defense instructions were proper. Not surprisingly, the Court of Appeals panel agreed.[180] Also not surprisingly, Burke has offered nothing persuasive to the contrary.

3.2 Fourth-Degree Assault Instructions.

Next, Burke looks to the three fourth-degree assault instructions given as lesser-included offense instructions to the second-degree assault instructions and maintains they

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176 (TR2, pp. 211-225.)

177 (TR2, p. 148.)

178 Burke improperly relies on a not-to-be-published decision of this Court. (Red brief, p. 45.)

179 Cooper & Cetrulo, *Kentucky Instructions to Juries (Criminal)*, §§ 11.07-11.10 (5th ed. 2012). It appears the trial judge modeled Instruction No. 5 (perfect self-protection) on the form instruction found at § 11.08 of Cooper's treatise and incorporated the imperfect self-defense concept into the lesser offense instructions (assault fourth) per §§ 11.07, 11.09, and 11.10.

180 (Tab 1, pp. 40-41 (Opinion) ("We agree with the Commonwealth . . . When coupled with the verdict forms for each count, which repeated the same four options for guilt – and not guilty – we are convinced jurors knew they were to consider both perfect and imperfect self-protection. Juries are 'presumed to follow any instruction given to them.'").)

were confusing, unclear, misstated the law of imperfect self-defense, and lacked key language.[181]

As the Commonwealth conceded, Burke's complaint is well-founded.[182] The panel noted,

> Although modeled on Cooper & Cetrulo, *Kentucky Instructions to Juries (Criminal)*, §§ 11.07, 11.09 and 11.10 (5th ed. 2006), the mental state instruction was not linked to the corresponding imperfect self-protection instruction. As a result, it was unclear jurors could convict Burke of fourth-degree assault solely if they doubted the knife used to stab the three male victims was a deadly weapon or dangerous instrument.[183]

The trial judge's error, of course, does not automatically result in reversal. Even if one were to indulge Burke and consider this error preserved for review, any error in these three instructions was harmless.[184] Burke certainly cannot meet the demanding RCr 10.26 standard.

The proof Burke was looking for a fight was overwhelming. His use of the colorful terms "fucking dykes" and "clit lickers" before assaulting a woman confirms his disposition as a hate-filled bigot. When presented with the opportunity to inflict more damage, he seized that chance, took out his knife, and slashed three males.

Burke's self-serving tale of being the calm in the eye of the storm was unbelievable from start to finish. It is inconceivable that the three slashing victims would have approached Burke – who, per his photograph, was over-the-top mean-looking, muscular, heavily tattooed, appeared as if he had been fighting (black eye), and bore a swastika tat-

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181 (Red brief, pp. 46-47.)

182 (Tab 1, p. 39 (Opinion) ("The Commonwealth admits the fourth degree assault instructions given as lesser included offenses of the second-degree assault instructions were flawed, but maintains the error was harmless").)

183 (Tab 1, pp. 41-42 (Opinion).)

184 *See Commonwealth v. McCombs*, 304 S.W.3d 676, 680 (Ky. 2009) (erroneous jury instructions are presumptively prejudicial but this presumption can be rebutted via showing error was harmless).

too on his left shoulder – and started a fight. Looking at the three victims during their testimony, the thought that any of them would have gone after Burke or caused Burke any fear is laughable.

As a result, Burke's self-defense theory was a non-starter. Proof of his menacing appearance, words, and actions that night eliminated any possibility the jury would accept either a perfect or imperfect self-defense argument. While the jury surely considered the fourth-degree assault instructions, that lesser offense simply did not fit the facts. Had the jury been presented error-free instructions, the result would have been identical.

In its decision, the panel reached the same conclusion. Analyzing the claim under the plain error standard, the panel concluded the "likelihood of the jury believing Burke's self-protection claim – whether perfect or imperfect – was nil."[185] The panel also noted,

> While he portrayed himself as a peacemaker, his words and actions spoke otherwise.
>
> Before attacking Pfeiffer, Patton and Akemon, he had already attacked Meyer as she tried to protect Kohlman. The evidence that Burke attacked the men without provocation was simply too strong to overcome.
>
> Even with perfect instructions, Burke would still have been convicted of three counts of second-degree assault. No palpable error occurred.[186]

Despite a second chance to persuade an appellate court that this instructional error warrants a new trial, Burke has failed. Burke is not entitled to any relief.

3.3 The Knife.

Burke concludes this claim by arguing there was insufficient proof that the knife he used was a "dangerous instrument" or "deadly weapon" per KRS 500.080, and therefore there was no unanimous verdict as to the second-degree assault convictions.[187]

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185 (Tab 1, p. 42 (Opinion).)

186 (Tab 1, p. 42 (Opinion) (text reformatted).)

Whether this knife constituted a "dangerous instrument" or "deadly weapon" was a question of fact for the jury.[188] There is no real question the knife was a "dangerous instrument" since it was "readily capable of causing death or serious physical injury."[189] If a carrot, work boots, and scissors can constitute a "dangerous instrument" then so can the blade Burke used to cut and scar his victims.[190] The panel naturally agreed[191] and Burke does not bother to contest this point except on a nonsensical ground.[192]

Likewise, Burke's assertion his knife was just "an ordinary pocket knife" is out-of-step with the record.[193] The photograph of Burke's knife shows it is something more than an ordinary pocket knife that the average person would carry.[194] The knife is large, appears to have a serrated blade, and contrary to Burke's description, does not "have utility blades on it" like a Swiss-Army knife.[195]

Further, the prosecutor opened the locking blade during her closing argument and showed it to the jury, demonstrating Burke's knife was not an "ordinary" pocket knife.[196] Indeed, a male officer also held the knife in his hand, revealing it to be sizeable.[197] The jury heard this proof, saw the knife, and made a sound decision that Burke's knife was not an "ordinary pocket knife" as contemplated by KRS 500.080(4). As the panel astutely

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187 (Red brief, pp. 47-49.)

188 *See Thacker v. Commonwealth*, 194 S.W.3d 287, 290-91 (Ky. 2006).

189 KRS 500.080(3).

190 *See Commonwealth v. Potts*, 884 S.W.2d 654, 657 (Ky. 1994), overruled on other grounds by *Doneghy v. Commonwealth*, 410 S.W.3d 95 (Ky. 2013); *Smith v. Commonwealth*, 610 S.W.2d 602, 603-04 (Ky. 1980).

191 (Tab 1, pp. 39-40 (Opinion) ("Since the knife caused serious physical injury to three men, requiring stitches and leaving scars, it qualified as a dangerous instrument, and the trial court was not required, as a matter of law, to deem it a deadly weapon").)

192 (Red brief, p. 48.)

193 (Red brief, pp. 48-49.)

194 A color photograph of the knife is behind Tab 3 of this brief.

195 (Red brief, p. 48.)

196 (VR, 03/17/11, 15:33:30-15:35:00.)

197 (VR, 03/16/11, 13:22:45.)

observed in rejecting Burke's argument, the jury "saw the knife firsthand and could decide for themselves."[198]

Finally, the panel correctly concluded there was sufficient proof to find the knife was a "dangerous instrument" and "deadly weapon."[199] It also correctly ruled there was no unanimous verdict problem.[200] Burke has failed to show the panel decision was incorrect.

4.0 Burke Was Not Denied the Right to Present a Defense.

For his fourth claim, Burke argues he was "denied his due process right to present a defense" as a result of the trial judge precluding him from asking a third round of questions of a defense witness (Clark), *i.e.*, re-redirect examination.[201]

Specifically, during the prosecutor's second round of cross-examination of Clark and in follow-up to defense counsel's questioning about whether Patton's hammer looked dangerous and if Patton went after Burke with it, the prosecutor and Clark had the following exchange:

> Prosecutor: But despite this man wielding this serious instrument you all got out of the car to confront him, is that accurate?
>
> Witness: Yes.
>
> Prosecutor: Thank you.[202]

This was the last question asked by the prosecutor.

In response, defense counsel tried to begin his third round of questioning but the trial judge would not allow it.[203] During his avowal testimony elicited by defense coun-

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198 (Tab 1, p. 40 (Opinion).)

199 (Tab 1, p. 40 (Opinion)); *see Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

200 (Tab 1, p. 40 (Opinion)); *see Hayes v. Commonwealth*, 625 S.W.2d 583, 584 (Ky. 1981).

201 (Red brief, pp. 49-50.)

202 (VR, 03/17/11, 10:43:50-10:44:50.) This exchange arose from what Clark described as the second instance when Clark and Burke exited the vehicle. (Tab 1, pp. 9-10 (Opinion).)

sel, Clark stated they were not looking to "confront" the hammer-wielding man but instead to find out what he wanted.[204] Clark also explained he did not intend to fight this man but he did not know what the others intended.[205]

In the Opinion, the panel rejected Burke's arguments and looked to both the trial judge's discretionary control over the "mode and presentation of evidence" as well as the fact Clark's testimony added nothing to Burke's defense:

> Burke claims the ruling denied him the right to present a defense because he would not be entitled to claim self-protection if he were the initial aggressor.
>
> Clark's direct testimony established Patton walked to the Firebird swinging a hammer. Thus, Clark's direct testimony having laid the groundwork for the self-protection claim, the defense was presented and the instruction was given.
>
> Ultimately, Clark's avowal testimony added nothing other than confirmation he did not exit the car intending to fight anyone and he knew no one's mindset but his own. We fail to see how this point was critical to the defense, and as the trial court stated, the point could be argued in summation.
>
> The trial court properly exercised its discretion under KRE 611(a). Nothing more need be said.[206]

The panel's decision was correct. A trial judge has wide discretion with respect to the scope of redirect and cross-examination.[207] Here the trial judge did not abuse her discretion in ending the examination of Clark. At some point the examination had to end and two full rounds was enough.

Further, the avowal testimony offered little clarity since Clark could not identify Burke's intentions. Similarly, exiting the vehicle to "confront" the hammer-wielding man

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203 (VR, 03/17/11, 10:44:45-10:46:45.)
204 (VR, 03/17/11, 10:50:15-10:51:30.)
205 (VR, 03/17/11, 10:50:15-10:51:30.)
206 (Tab 1, pp. 38-39 (Opinion) (text reformatted).)
207 *Brown v. Commonwealth*, 174 S.W.3d 421, 431 (Ky. 2005); KRE 611(a).

is not substantively different from exiting "in response to the man with the hammer" or to find out what the hammer-wielding man wanted.[208]

As for Burke's attempt to transform and elevate an ordinary evidentiary ruling into a constitutional issue, his effort must fail. Despite Burke being precluded from offering this evidence, he presented his defense and no constitutional right was implicated.[209]

Even if error occurred, though, it had no effect on the trial's outcome.[210] It is unbelievable any juror would find Clark – or Burke after having already assaulted Meyer – exited the vehicle simply to ask a man wielding a hammer, "What do you want?," or for any other non-confrontational purpose.

Similarly, if the Court concludes this error undermined Burke's right to present a defense and is constitutional in nature, such error is certainly harmless beyond a reasonable doubt.[211]

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208 (*Contra* Red brief, p. 50 ("Whether Burke and the others got back out of the car to actually confront the man with the hammer was different than what Clark had previously said about getting out in response to the man with the hammer. Confrontation connotes an intention to be aggressive, not merely getting out to see what the man with the hammer was doing.").)

209 *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Jones v. Commonwealth*, 331 S.W.3d 249, 256 (Ky. 2011) (rejecting contention alleged error regarding admission of bad acts evidence was constitutional in nature); *Mills v. Commonwealth*, 996 S.W.2d 473, 489 (Ky. 1999) ("*Chambers* holds that application of evidentiary rules cannot be applied so as to completely bar all avenues for presenting a viable defense. It does not hold that evidentiary rules cannot be applied so as to properly channel the avenues available for presenting a defense."), overruled on other grounds in *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010).

210 *See Winstead v. Commonwealth*, 283 S.W.3d 678, 689 (Ky. 2009) ("A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error").

211 *See Chapman v. California*, 386 U.S. 18, 24 (1967).

CONCLUSION

For these reasons, the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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